

APPELLANT'S REPLY BRIEF

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 15-4060

KENT S. HUGHES,

Appellant,

v.

**ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,**

Appellee.

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

KENT S. HUGHES,)	
)	
Appellant,)	
)	Vet. App. No. 15-4060
v.)	
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

REPLY BRIEF OF THE APPELLANT

Pursuant to U.S. Vet. App. R. 28(c), Kent S. Hughes (Veteran, Appellant or Claimant), respectfully submits to the United States Court of Appeals for Veterans Claims (Court), his Reply Brief in response to the Appellee's (Secretary's) Brief (Sec. Br.), and continues to assert that there are errors of law contained within the Department of Veterans Affairs (VA) decision of September 28, 2015 in which the Board of Veterans' Appeals (Board or BVA) denied the Appellant's claim of entitlement to service connection for hypertension.

STATEMENT OF THE ISSUES

- I. WHETHER THE BOARD CLEARLY ERRED IN FAILING TO ENSURE VA FULFILLED ITS STATUTORY DUTY TO ASSIST THE VETERAN.**
- II. WHETHER THE BOARD FAILED TO SUPPORT ITS SEPTEMBER 28, 2015 DECISION WITH ADEQUATE REASONS OR BASES.**

ARGUMENT

The Appellant continues to assert that the Board's decision of September 28, 2015 was in error. *See* R. at 1-16. The Appellant incorporates by reference his arguments presented in his Brief and makes reply to the Brief of the Appellee in the interest of further clarity.

The Secretary avers that "[t]he June 2010 VA examination and opinion were adequate to adjudicate the claim for service connection for hypertension. The examiner based her opinion on consideration of Appellant's prior medical history, as well as his lay testimony of onset and symptomatology of his hypertension." Sec. Br. at 7. To the contrary, the June 2010 VA examination is inadequate as the examiner failed to provide a sufficient rationale and based his medical opinion on a factually inaccurate premise. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (to be adequate, a medical opinion must not only state a conclusion as to the etiology of a medical condition, but must also support that conclusion with sufficient rationale and explanation); *see also Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (a medical opinion based upon an incorrect factual premise is of no probative value).

For a rationale, the June 2010 VA examiner stated that the “Veteran was [worked up] for hypertension while he was in service, in the 1970s. The [work up] was negative and the [V]eteran was never started on medication. He began taking hypertensive medi[cation]s in 2004, when he was diagnosed with hypertension and has been on antihypertensive medi[cation]s since then.” R. at 529 (527-529). This is a wholly insufficient rationale to support the VA examiner’s negative nexus opinion. Relying upon the lapse in time does not adequately explain why the Veteran’s high blood pressure readings in service are not related to his currently diagnosed hypertension. In other words, the June 2010 VA examiner failed to sufficiently explain why the onset of the Veteran’s diagnosed hypertension was not in-service when he first experienced documented high blood pressure readings. *See* R. at 226 (Radiographic report of 8/1/72 notes a high blood pressure reading of 150/100); *see also* R. at 192 (Clinical record of 8/3/72 documents a high blood pressure reading of 170/108); R. at 157 (service treatment record (STR) of 6/26/73 indicates that the Veteran had a high blood pressure reading of 140/80). Without a sufficient rationale, the June 2010 VA examination is wholly inadequate.

Next, the June 2010 VA examiner based his medical opinion a factually inaccurate premise. Specifically, the VA examiner stated that the Veteran was only seen with high blood pressure during 1972, but this is not true and the examiner wholly neglected to consider the Veteran’s third high blood pressure reading in-service, which is documented in a STR of June 26, 1973 with a reading of 140/80. *See* R. at 157; *see also* R. at 527 (June 2010 VA examiner noted that “in 1972, [the Veteran] was found to have elevated

BP [blood pressure]”). In response, the Secretary claims that “a medical examiner need not comment on every piece of evidence in the claims file, even evidence favorable to an appellant’s claim.” Sec. Br. at 9. Further, the Secretary went on to state that, “although arguably elevated, that blood pressure reading alone is insufficient to diagnose hypertension.” *Id.* citing 38 C.F.R. § 4.104 (2013), Diagnostic Code 7101, Note (1) (providing that a hypertension diagnosis must be confirmed by blood pressure readings taken two or more times on three different days). Despite the Secretary’s response, the VA examiner had an obligation to discuss the Veteran’s three (3) documented high blood pressure readings in service and accurately note his medical history, which was not done. Without a factually accurate medical opinion that fully considered and discussed all of the Veteran’s in-service high blood pressure readings, the June 2010 VA medical examination was based on a factually inaccurate premise and, therefore, holds no probative value. *See Reonal v. Brown*, 5 Vet. App. 458, 461 (1993).

Lastly, the Secretary contends that “[t]he Board provided adequate reasons or bases for finding that Appellant’s hypertension was not incurred in or a result of military service.” Sec. Br. at 10; *see Allday v. Brown*, 7 Vet. App. 517, 527 (1995) (the Board is to include in its decision a statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, with such statement being adequate to enable an appellant to understand the precise basis for the Board’s decision as well as to facilitate review by this Court). Contrary to the Secretary’s position, the Board failed to support its decision with adequate reasons or bases insofar as it failed to consider all potentially applicable provisions of law and regulation. *See* 38 U.S.C. §

7104(a) (2012) (the Board is required, as the final trier of fact, to make a decision based upon consideration of the entire record and all applicable provisions of law). Specifically, the Board failed to consider the potential application of entitlement to service connection for hypertension on the basis of chronicity. *See* 38 C.F.R. § 3.303(b) (2013).

The Veteran experienced at least three (3) documented high blood pressure readings while in service. *See* R. at 226 (Radiographic report of 8/1/72 notes a high blood pressure reading of 150/100); *see also* R. at 192 (Clinical record of 8/3/72 documents a high blood pressure reading of 170/108); R. at 157 (service treatment record (STR) of 6/26/73 indicates that the Veteran had a high blood pressure reading of 140/80). To support his negative nexus opinion, the June 2010 VA examiner relied upon the lapse in time of almost thirty (30) years before the Veteran required medication to treat his hypertension (R. at 529); however, for purposes of chronicity, “subsequent manifestations of the same chronic disease at any later date, however remote, are service connected[.]” 38 C.F.R. § 3.303(b). Thus, the lapse of time is irrelevant in determining whether the Veteran is entitled to service connection for hypertension on the basis of chronicity. The Board merely relied upon the inadequate June 2010 VA examination and wholly neglected to consider or discuss this provision of law. Consequently, vacatur and remand is warranted as that is the appropriate remedy where the Board failed to consider all possible theories of entitlement and failed to support its decision with adequate reasons or bases. *See Combee v. Brown*, 34 F.3d 1039, 1045 (Fed. Cir. 1994) (service connection may be considered under more than one theory of entitlement if reasonably

raised by the evidence); *see also Washington v. Nicholson*, 19 Vet. App. 362, 371 (2005) (remand is the appropriate remedy when the Board fails to support its decision with adequate reasons or bases).

Therefore, Appellant continues to assert that the Board's decision on appeal contains errors sufficient to warrant remand.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the September 28, 2015 Board decision be vacated and the case remanded for further adjudication consistent with this Court's decision and applicable law.

Respectfully submitted,

August 5, 2016

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